

BRIEF SUMMARY OF THE CITY'S DISPUTE WITH THE BPW

The Board of Public Works (BPW) respects the Mayor and Council and its dedication to numerous issues it encounters throughout the year. The Board and the City have worked exceptionally well together as a team for 119 years. To the best of my knowledge, this is the first time in that history that Mayor and Council have attempted to do away with the BPW's independently elected Board and assume total control over the operations of its utilities. It is disappointing that the dispute has degraded into personal attacks.

Unfortunately, the letter signed by the Mayor and Council that recently appeared on the City's website misrepresents and fails to mention several of the basic issues and facts in the dispute. This includes the central issue of why the BPW felt it should no longer enforce a pre-annexation requirement. This letter is offered to correct some of the misrepresentations and to provide crucial facts missing from the City's letter.

The ongoing disagreement with the City was initially about whether the BPW should enforce the Pre-Annexation condition (a requirement that properties outside of the City agree to annex into the City in order to receive utility service). By enforcing this Pre-Annexation condition, the BPW could be exposing the utility system to litigation, liability, and potentially costly damages.

The BPW's concerns are not unfounded. There are many areas outside of the City limits where the BPW is currently designated as the sole provider of utility service. While there has been an informal policy in favor of pre-annexation agreements for several years in the past, this approach only became a written policy in 2007 and has not been applied consistently. Wolfe Runne, which was built in 1986, and Wolfe Pointe, which was built in

1997, are two examples of communities receiving BPW utility service without having signed a Pre-Annexation agreement.

In 2016, a previous Director of the Delaware Public Service Commission, who is now a BPW Board Member, expressed to the Board that he did not believe the Pre-Annexation condition was enforceable and could possibly be illegal. At the time, the City's attorney was also the BPW's attorney. We asked him to give us his opinion on enforceability and legality of the Pre-Annexation condition. After some researching, he responded in writing expressing concern that it probably wasn't enforceable, but it had never been tested in court. Several months later, the BPW asked its current attorney the same question. He too expressed similar concerns.

Having three knowledgeable opinions that the Pre-Annexation condition likely wasn't enforceable and possibly illegal, the BPW Board felt it was improper to try to enforce the policy. This was the reason for the Board's plan to eliminate the Pre-Annexation condition, and not, as the Mayor and Council continue to assert, that the Board wanted to expand its services just to grow the business. Again, enforcing a policy that we knowingly believed could be illegal could expose the BPW to a legal challenge by landowners requesting our services.

The Mayor and Council were not happy with the Board's plans to eliminate the Pre-Annexation condition. Unbeknownst to the BPW, the City hired an attorney from Wilmington to fight against our potential action. Instead of asking him to evaluate our understanding of the legality of the Pre-Annexation condition, he was asked to show that the City had total control over the BPW, and that they could tell us what to do over our objections. The City informed us that they had an opinion from this attorney but wouldn't provide it to us unless we signed a non-disclosure agreement. **This action by the City was the beginning of the costly legal battle with them that ensued, not the eventual court case that occurred more than a year later, as they contend.**

It was clear to the BPW at that point that the City's main goal was to change the 119-year-old relationship between the two entities, and take

total control, as they are still attempting to do today. The Pre-Annexation condition issue seems to be their way of doing it. **Throughout this dispute, the City has never attempted to determine the legality of the Pre-Annexation condition.** They just want total control over the utility system.

In response to the City's opinion from the Wilmington attorney, the BPW had its attorney investigate the City's claim of control over us and determined that was not the case. **This opinion appears to have been supported by Judge Bradley of the Superior Court earlier this year.**

Although Judge Bradley dismissed the court case between the BPW and City concluding that the BPW can only sue where authorized in its Charter, he nevertheless noted, "[w]hile the City has presented numerous arguments as to why the BPW *should* acquiesce to its desire to enforce the Pre-Annexation Condition, the City quite evidently lacks the actual ability to force the BPW to do so."

That court case was intended to be an attempt to resolve the issue of the legality of the Pre-Annexation condition. Unfortunately, the City had raised the stakes in the dispute to the City's contention of total control over the BPW. **The City has contended that they weren't aware of the lawsuit until the Board initiated it. That is not true. The Mayor and I discussed it and our attorney had discussions regarding it with the City's Wilmington attorney, prior to the case being initiated.** In fact, the City adopted its June 2019 Resolution and Ordinance over the BPW's objection, with the understanding that the City and BPW would work to submit the issue to a court for resolution.

Prior to the Court giving its opinion, the Mayor and Council again raised the stakes in the dispute by beginning work on their proposed charter change to take over the BPW. Charter changes require approval of the Delaware General Assembly. Although the City has experience working with the General Assembly on various issues, the BPW does not. The BPW hired a consultant to guide us through the legislative process in Dover. This is being portrayed by the City as an underhanded move by the BPW.

Throughout this entire dispute, the Mayor and Council have limited the public's opportunity to provide input. To date, the only public presentation of their plans for a Charter change was a conceptual reveal at a Council meeting in late December of last year. An issue of this importance, which would impact every citizen and property owner in Lewes, and surrounding areas, warrants a thorough airing of the issues in hearings and workshops, possibly with published fact sheets. This has not occurred.

Through much of this time, I've had ongoing discussions with the Mayor, to no avail. On several occasions, the Board encouraged negotiations to resolve the dispute. Only after encouragement from our elected officials, Senator Lopez and Representative Smyk that both sides meet to resolve their issues before bringing the issues to Dover for a Charter change, did the City agree to a joint meeting without pre-conditions. A meeting had been set for March 24th, but then the pandemic stay-at-home restrictions were established. The City suggested meeting in an executive session, either face-to-face or in virtual meeting. But the BPW has insisted that a meeting of this importance should be held after restrictions are lifted, when the meeting can occur in person and in a setting open to the public that would enable easy public access and input.

It is obvious that the City feels that they have to have total control over the operation of the BPW. What started with the BPW expressing concern over the enforceability of the Pre-Annexation condition has been spun by the City to advance an agenda to take over control of the BPW despite our record of excellent service and some of the lowest rates in the State.

We do not believe that the City's proposed takeover is in the best interests of the utility system. The BPW is a public body subject to Delaware's Freedom of Information Act and is directly accountable to the public that elects its Board, just as is the case for any other municipal utility in the State of Delaware. And when it comes to setting rates, the BPW is similarly directly accountable to the ratepayers. This direct accountability is why the BPW and other municipal utilities are not subject to Public Service

Commission approval for rates. **Critically, the BPW is elected by, and directly accountable to, all of the utility system's ratepayers, which include upwards of 1,000 ratepayers (or more) who are not eligible to voice their opinion in City Council elections. Ceding total control to the City, including over rates, as it has demanded, would result in less public accountability, not more as the City claims.**

This dispute has been difficult on us all. But despite the strained relationship, we continue to believe that dialogue and compromise is possible. To that end, I reiterate the BPW's call for a discussion, and look forward to working with the Mayor and Council and having constructive discussions based on mutual respect, public accountability, and the best interests of the citizens and all our ratepayers.

D. Preston Lee, P.E.

President of the Lewes Board of Public Works